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No. 86-1419

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1987

STATE OF OREGON, DEPARTMENT OF HUMAN RESOURCES; RICHARD C. LADD,
*Petitioners,*

v.

COOS BAY CARE CENTER, INC., an Oregon Corporation; HANNAH SCHWANKE, Guardian *Ad Litem* for David and Steven Gibbs; and SANDI WATSON-STOWELL, Guardian *Ad Litem* for Tami Watson,
*Respondents.*

**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## RESPONDENTS' SUPPLEMENTAL BRIEF AND REPLY IN SUPPORT OF MOTION TO DISMISS

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## RULE 28.1 LIST

Respondent Coos Bay Care Center, Inc. has no parent company, subsidiaries or corporate affiliates to list pursuant to Rule 28.1.

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*Respondents.*

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**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

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## RESPONDENTS' SUPPLEMENTAL BRIEF AND REPLY IN SUPPORT OF MOTION TO DISMISS[1]

## STATEMENT OF THE CASE

The statement of the case and the relevant facts are set forth in Respondent's Motion to Dismiss.

Respondents Coos Bay Care Center, Inc. (Coos Bay) and Hannah Schwanke file this supplemental brief to reply to petitioners' arguments in opposition to the motion to dismiss

[1] This supplemental brief is filed on behalf of both respondent Coos Bay Care Center, Inc. and respondent Hannah Schwanke as guardian *ad litem* for David and Stevens Gibbs. Respondent Hannah Schwanke joins in the Motion to Dismiss.

and to apprise the Court of a recent development which affects this case. Effective on or about July 1, 1987, Oregon repealed and replaced the statute governing payment for nursing home services. The new statute directs petitioner Oregon Department of Human Resources, Senior Services Division to establish rules implementing a "patient-based reimbursement system." S. Bill 517, § 2.[2]

## ARGUMENT

### I. THE ENACTMENT OF OREGON SENATE BILL 517 MAY MOOT THIS CASE BY REPLACING THE EXISTING MEDICAID REIMBURSEMENT SYSTEM WITH A NEW REIMBURSEMENT SYSTEM.

Senate Bill 517 requires implementation of a "patient-based reimbursement" system for nursing home services, defined as "reimbursement for direct patient care according to the needs of the patient, based on multiple levels of patient health, functioning and impairment." S. Bill 517, § 2(1) and (2). The statute mandates that the reimbursement system "meet the legitimate costs of caring for patients." *Id.* at § 2(1). The statute was effective on or about July 1, 1987 and petitioner Oregon Department of Human Resources, Senior Services Division was directed to promulgate rules establishing both "definitions of levels of care and the payment rates for the patient-based reimbursement system." *Id.* at § 2(3).

Implementation of patient-based reimbursement criteria will fundamentally alter the reimbursement system challenged in the Complaint. This action was filed because petitioners set

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[2] Because of the lag time in publishing state session laws, counsel for respondents only discovered the existence of Senate Bill 517 after the Motion to Dismiss had been printed. Counsel informed counsel for petitioners about the existence of the new law in a telephone conversation which preceded the filing of petitioners' Response in Opposition to Motion to Dismiss ("Pet. Resp."). (A copy of the law, referred to here as "Senate Bill 517," is included as the appendix to this brief.)

nursing home reimbursement rates without considering patient needs, thereby depriving the patient respondents [3] of the quantity and quality of care guaranteed them by federal and state law. J.A. at 6. The new statute expressly addresses this issue, ordering petitioners to "meet the legitimate costs of caring for patients" by predicating reimbursement on the "needs of the patient, based on multiple levels of patient health, functioning and impairment." S. Bill 517, § 2.

Although the new statute is similiar in many respects to its predecessor, there are significant distinctions. The most obvious distinction is a clause which requires the Senior Services Division to establish rules defining levels of care and payment rates for the new patient-based reimbursement system. The formal directive to establish rules implementing the new reimbursement methodology apparently was added because petitioners ignored the statute's predecessor and failed to implement the patient-based reimbursement system required by the now-repealed legislation.

A change in the statutory scheme may moot a challenge to that statutory scheme, requiring dismissal. *See, e.g., Green v. Mansour*, 474 U.S. 64 (1985). In this case, the change in the law goes to the heart of the conflict and, unless disregarded by petitioners, may moot the substantive issues raised by the Complaint.

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[3] As correctly noted by petitioners, the individual plaintiffs are guardians *ad litem* for patients of the facility. *See* Pet. Resp. at 1, n.1. For ease of reference, this brief will also refer to the "plaintiff" or "respondent patients."

## II. DESPITE PETITIONERS' ARGUMENTS TO THE CONTRARY, THE SALE OF THE ASSETS OF THE COOS BAY CARE CENTER TO THE SOUTHMARK CORPORATION RENDERS THIS CASE MOOT, REQUIRING DISMISSAL.

### A. The Eleventh Amendment In Combination With The Sale Of The Nursing Home Requires Dismissal Of This Case.

Petitioners' erroneously argue that respondents' claims for retrospective relief remain viable, preventing the controversy from being mooted. Pet. Resp. at 6-8.[4] Petitioners argue that "[m]ootness simply is the wrong analytic label" and that Coos Bay has confused the issue of entitlement to relief with the "existence of a legally cognizable controversy." *See* Pet. Resp. at 7.[5]

This Court, however, has held that Article III of the Constitution precludes jurisdiction if the plaintiff's injury cannot be redressed by a favorable decision. *See, e.g., Valley Forge College v. Americans United for Separation of Church and State*, 454 U.S. 464, 472 (1982). Similarly, this Court has held that the applicability of the Eleventh Amendment jurisdictional bar depends entirely on whether prospective relief will redress plaintiff's injury, and not upon whether a legal controversy

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[4] Petitioners characterize the Motion to Dismiss as a "transparent attempt to call off an ongoing battle because, from the respondent's perspective, it is going badly." Pet. Resp. at 3. Petitioners ignore counsels' obligation, made explicit by this Court, to "'inform the Court of any development which may conceivably affect the outcome of the litigation.'" *Board of License Comm'rs of the Town of Tiverton v. Pastore*, 469 U.S. 238, 240 (1985) (*per curiam*) (quoting *Fusari v. Steinberg*, 419 U.S. 379, 391 (1975) (Burger, C.J., concurring)). Petitioners' characterization also is presumptuous, particularly in light of this Court's longstanding rulings on the issues raised by this case. *See, e.g., Rosado v. Wyman*, 397 U.S. 397, 406 (1970); *Carter v. Stanton*, 405 U.S. 669, 671 (1972). *See Maine v. Thiboutot*, 448 U.S. 1 (1980).

[5] Petitioners have not waived their Eleventh Amendment immunity. Indeed, it is clear that counsel for petitioners cannot waive the immunity defense, rather, that waiver must come from the State itself. *See generally Florida Dep't of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 683 n.18 (1982).

continues to exist between the parties. *See, e.g., Quern v. Jordan,* 440 U.S. 332, 337 (1979); *Green v. Mansour,* 474 U.S. 64 (1985).

In *Florida Department of Health and Rehabilitative Services v. Florida Nursing Home Association,* 450 U.S. 147 (1981) (*per curiam*), for example, this Court ordered dismissal of a case seeking increased Medicaid payments because amendments to both the federal and state Medicaid statutes mooted the claims for prospective relief. While the nursing home's claims for retrospective relief remained "viable" in the same sense that respondents' claims for retrospective relief here remain viable, this Court held that in the absence of viable claims for prospective relief, the Eleventh Amendment required dismissal. *Id. See also* Respondent's Motion to Dismiss at 7-9. Thus, as here, where a change in the factual circumstances or a change in the challenged law moots all claims for prospective relief, the Eleventh Amendment deprives the federal courts of jurisdiction and the case must be dismissed.

### B. The Sale Of The Nursing Home And The Adoption Of A Patient-Based Reimbursement System Moots The Claims For Prospective Relief As To All Respondents.

#### 1. Coos Bay's Claims.

Petitioners acknowledge that Coos Bay's claims for prospective relief have been mooted by the sale of the nursing home's assets to a new corporate owner, the Southmark Corporation.[6] Petitioners nonetheless argue that "Southmark has simply stepped into CBCC's shoes" (Pet. Resp. at 10) and should be compelled to become a plaintiff pursuant to Federal Rule of Civil Procedure 25(c).[7] The argument is wrong.

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[6] Petitioners state: "On the question of injunctive and declaratory relief, CBCC[,] Inc. correctly points out that the sale of the care facility terminated any prospective interest it had in future Medicaid reimbursement levels." *See* Pet. Resp. at 8.

[7] Rule 25(c), of course, governs the district courts. Supreme Court Rule 40 provides for substitution of parties before this Court in certain circumstances, none of which are asserted by petitioners. Respondents address

*(footnote continues)*

Rule 25(c) provides that "[i]n case of any transfer of interest" the court upon motion may direct the person to whom the interest is transferred to be substituted in the action or joined with the original party. Two principles applicable to this matter are derived from the rule. First, the rule requires, as a prerequisite to substitution, transfer of an interest in the subject of the litigation. Second, Rule 25(c) "does not determine what actions shall survive the . . . transfer of interest by a party; it deals only with the mechanics of substitution in an action which *does* survive under the applicable substantive law." 3B J. Moore and J. Kennedy, Moore's Federal Practice ¶ 25.04[3] (2d ed. 1987).

The mere sale of assets by a litigant to an unrelated party for use in that party's independent business ventures generally is not a basis to force the purchaser to become an unwilling plaintiff. *Cf. Golden State Bottling v. NLRB*, 414 U.S. 168 (1973); *R.J. Engstrom Corp. v. Interceptor Corp.*, 555 F.2d 277 (10th Cir. 1977). Moreover, there was no transfer of interest in the litigation from Coos Bay to Southmark.

Coos Bay could not transfer its provider agreement, *i.e.*, its entitlement to Medicaid reimbursement, to Southmark. The federal regulation relied upon by petitioners establishes that Southmark's claim to Medicaid reimbursement arises solely because the Medicaid agency, *i.e.*, petitioners, assigned the provider agreement to Southmark. *See* 42 C.F.R. § 442.16. The assignment occurred only because Southmark applied to petitioners for relicensure and recertification. *See* Motion to Dismiss, App. B at 12a. Relicensure and recertification—which petitioners concede is "one of the most important

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*(footnote continued)*

petitioners' arguments in the interest of expediency. However, it should be noted that none of the facts on which petitioners rely are part of the record and the request denies Southmark the opportunity to be heard. Further, even petitioners concede the futility of their effort to keep this case alive, stating that "[i]t may be that if this case were returned to the district court for trial, neither CBCC Inc. nor Southmark would choose to devote their resources to pursuing their claims." Pet. Resp. at 10. Petitioners' statement highlights the abstractness of review by this Court and raises a substantial question whether there remains any case of controversy which ought to be adjudicated by the federal courts.

Medicaid procedural hurdles to clear" (Pet. Resp. at 10)— was required precisely because Southmark did not "step into CBCC's shoes." Southmark was required to establish its own claim to payment and to assume independently the obligations imposed on nursing home owners by state and federal law.

There are other indications that Southmark is neither a continuation of Coos Bay, Inc. or the *de facto* or *de jure* successor in interest to the claims asserted by Coos Bay. Southmark is entirely unrelated to Coos Bay. Southmark acquired the nursing home in a multi-million dollar transaction involving twenty-eight nursing homes. The purchase and sale were negotiated at arm's length. No one who held an ownership interest in the Coos Bay Care Center is related in any way to Southmark. Southmark purchased only designated assets from respondent Coos Bay, specifically excluding any claim against petitioners. Respondent Coos Bay, Inc. continues to exist and retains all of its claims against the Oregon Medicaid program. *See generally* Motion to Dismiss, App. A at 7a-8a.

Further, despite petitioners' claim that "[n]one of the relevant facts has [sic] changed" (Pet. Resp. at 10), Southmark's factual position is quite different from that of respondent Coos Bay. In July 1987, for example, Southmark received an across-the-board Medicaid rate increase of approximately five dollars per patient, per day.[8] The rate increase reflects the fact that Southmark's costs of delivering care—the basis for Medicaid reimbursement—are not identical to those experienced by the former operator, respondent Coos Bay. Thus, a judgment that Coos Bay is entitled to greater Medicaid reimbursement than paid by petitioners does not compel a finding that Southmark also has been under-reimbursed. Finally, the new Oregon statute, S. Bill 517, orders the Senior Services Division, one of the petitioners here, to "establish by rule definitions of levels of care and the payment rates for [a] patient-based reimbursement system" which reimburses "direct patient care according to the needs of the patient" and "meet[s] the legitimate costs of caring for patients." S. Bill 517, § 2. Due to

[8] According to Southmark officials, the "all-inclusive" intermediate care rate increased from $42.61 to $47.60 per patient, per day. The "heavy cost" rate increased from $51.54 to $56.25 per patient, per day.

the increased payments, the change in the cost of delivering care and the change in the statutory reimbursement criteria, officials of Southmark have advised counsel that, in their view, litigation against the Oregon Medicaid Program is not warranted at this time.[9]

Petitioners' relicensure and recertification of the nursing home belie the claim that the purchase and sale were without legal significance. Any injury which Southmark might suffer because of petitioner's illegal conduct—and none is alleged in this record—is entirely a result of Southmark's relationship with petitioners and did not result from the transfer of any interest by Coos Bay. Finally, Southmark, which recently received a rate increase of five dollars per patient, per day, operates the nursing home in a different economic and legal environment than did Coos Bay. No claim Southmark might have against petitioners is presently before the Court. There is no basis to substitute Southmark as a plaintiff in this litigation.[10]

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[9] Such officials have indicated their intent to pursue any reimbursement disputes with State officials informally.

[10] *DeVeau v. Braisted*, 363 U.S. 144, 146 n.2 (1960), cited by petitioners is inapposite. In that case, the plaintiff/appellant was an individual, not the union, and the fact that the original union of which plaintiff was an officer was disbanded was only marginally relevant to the controversy. In *NLRB v. Insurance Agents*, 361 U.S. 477, 500 n.32 (1960), also cited by petitioners, the mootness issue was not raised. In that case, the original defendant union had *merged* with a second union. A merger of two entities clearly has distinct implications from a purchase of assets—the type of transaction at issue here. *See* Motion to Dismiss at 3-5. Southmark and respondent Coos Bay Care Center Inc. remain two distinct corporate entities, unrelated by ownership or control.

Petitioners repeatedly cite cases which stand for the proposition that mere voluntary cessation of a challenged practice does not moot a case and that if the challenged actions are capable of repetition yet evading review, the case is not moot. *See* Pet. Resp. at 7, *citing City of Mesquite v. Alladin's Castle, Inc.*, 455 U.S. 283 (1982); *id.* at 11, *citing Carrol v. President and Comm'rs of Princess Anne*, 393 U.S. 175 (1968). These cases are also inapposite. This case parallels *Board of License Comm'rs of the Town of Tiverton v. Pastore*, 469 U.S. 238 (1985). There is no suggestion that any future controversy between the parties is of such short duration that it is capable of repetition, yet evading review.

**2. The "Patient Plaintiffs" And The Putative Class.**

Petitioners concede that "Tami Watson's interests in prospective relief may now be moot, given her classification as a heavy cost patient".[11] Pet. Resp. at 12-13. Because the cost of Tami Watson's care is paid at the heavy cost rate, she suffers no continuing injury and asserts no claim within the jurisdiction of the federal courts. *See, e.g., Edelman v. Jordan*, 415 U.S. 651, 668 (1974). *See also* Pet. Brief on the Merits at 41.[12]

Petitioners erroneously argue that the sale of the nursing home has no impact on the status of the remaining plaintiffs because "[a]t most, David and Steven Gibbs would have to amend the complaint to refer to the new corporate owner where relevant references to CBCC Inc. previously appeared." Pet. Resp. at 12. The argument ignores the nature of the injury alleged in the Complaint.

The Complaint alleges that petitioners have deprived respondents of rights conferred by the Medicaid Act, 42 U.S.C. § 1396 *et seq.*, but the injury in fact necessary to confer standing, as contrasted with the abstract violation of a federal statute, is the actual deprivation of necessary care and treatment. The injury in fact alleged by the patient plaintiffs, as petitioners appear to recognize, is the allegation that "David and Steven Schwanke [sic] and Tami Mauer [sic], and the class they represent do not receive the quantity or quality of care guaranteed to them" by federal and state law "although Plaintiff Coos Bay Care Center does afford 'heavy care' patients as much 'heavy care' as possible." Complaint, J.A. at 6. *See also* Pet. Resp. at 12.

There is no allegation before the Court—only petitioners' abstract speculation—that Southmark, the new owner of the nursing home, has failed to provide appropriate care or that the patients are receiving deficient care from the new owner. It makes little jurisdictional difference that the patient respondents may have alleged insufficient care when the nursing home

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[11] As the Court previously was advised, counsel does not represent Ms. Watson or her guardian. The status of Ms. Watson's representation remains unclear.

[12] Petitioners stated: "Clearly, however, the claim for retroactive monetary damages is barred by the Eleventh Amendment." Pet. Brief at 41.

was operated by respondent Coos Bay. Unless the patients continue to be deprived of guaranteed care, they suffer no injury in fact, have no standing and this case is moot.

The ability of the present owner, Southmark, to deliver appropriate care, and whether such care actually has been delivered, are unrelated to the ability of Coos Bay to deliver such care. The ability of a nursing home operator to deliver appropriate care within available reimbursement levels is a function of numerous variables ranging from patient mix to staffing and including the intangible skills and resources which permit one nursing home to deliver care more economically and efficiently than another. Thus, the costs of delivering mandated levels of nursing care differ greatly from nursing home to nursing home.[13]

Whether the patients might be able to allege a continuing injury in fact based on the quantity or quality of care provided to them by Southmark is not revealed by the record before the Court. Plainly, however, the injury in fact alleged by the named plaintiffs in the complaint—predicated on respondent Coos Bay's inability to deliver care—is no longer on-going because Coos Bay no longer provides care of any type, and thus the claims presently before the Court have become moot.

Further, the new Oregon statute formally directs the Senior Services Division to establish rules defining levels of care and payment rates for patient-based reimbursement. The statute appears to require consideration of many of the factors which caused the injury alleged here. Unless petitioners ignore the command of the legislature, the new statute will result in implementation of a new reimbursement methodology distinct from that at issue here, an event which will moot all of the patient plaintiffs claims, including the putative class members claims.

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[13] Any claim that the new owner, Southmark, provides deficient care due to under-reimbursement by petitioners raises factual issues distinct from those made out here by respondents and is properly the subject of a separate lawsuit if anyone chooses to bring such a case. If brought, the lawsuit will focus on the ability of Southmark, with its unique capital structure and operating costs—not Coos Bay—to deliver appropriate care. Undoubtedly one of the significant issues raised in any such litigation will be the impact of the across-the-board rate increase of approximately five dollars per patient, per day received by Southmark after acquiring the nursing home.

Petitioners erroneously argue that the case is not moot as to the putative class even if the claims of the named patient plaintiffs are moot. This Court has held that a case is moot and must be dismissed if the claims of the class representatives are moot, unless a class has been certified by the lower courts pursuant to Federal Rule of Civil Procedure 23. *See Board of School Comm'rs v. Jacobs*, 420 U.S. 128, 129 (1975); *see also Kremens v. Bartley*, 431 U.S. 119, 129-130 (1977).

## CONCLUSION

For the reasons stated herein and in the Motion to Dismiss, this case must be dismissed.

Respectfully submitted,

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## APPENDIX

**64th OREGON LEGISLATIVE ASSEMBLY—1987**
**Regular Session**

**B-Engrossed**
**Senate Bill 517**

Ordered by the Senate June 8
Including Senate Amendments dated April 27
and June 8

Sponsored by Senators ROBERTS, OLSON (at the request of United Seniors, Oregon Health Care Association, Oregon Association of Homes for the Aging)

## SUMMARY

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure.

[*Establishes*] Directs Senior Services Division to develop by rule patient-based reimbursement system with quality incentive payments for nursing facilities. Defines patient-based reimbursement [*and quality incentive payment. Creates Quality Incentive Fund*].

[*Appropriates $ for biennium.*]

**Declares emergency, effective on passage.**

## A BILL FOR AN ACT

Relating to nursing facility reimbursement; creating new provisions; repealing ORS 410.850; and declaring an emergency.

**Be It Enacted by the People of the State of Oregon:**

**SECTION 1.** ORS 410.850 is repealed and section 2 of this Act is enacted in lieu thereof.

**SECTION 2.** (1) The Legislative Assembly finds and declares that patients admitted to and cared for by long term care facilities in Oregon are more impaired than in the past. In keeping with the traditional commitment of the State of Oregon to the care and protection of its frail, elderly and handicapped citizens, as expressed in ORS 410.020(1) to (6), the Legislative Assembly declares that a patient-based reimbursement system emphasizing quality incentives is appropriate for long term care facilities. Such a system would reward long term care facilities for outcomes, such as maintaining or improving a patient's condition, and meet the legitimate costs of caring for patients.

(2) "Patient-based reimbursement" means reimbursement for direct patient care according to the needs of the patient, based on multiple levels of patient health, functioning and impairment. Notwithstanding the above, patient-based reimbursement does not require the Senior Services Division to assess each patient and reimburse long term care facilities according to the constantly changing conditions of the patients except for changes between skilled and intermediate levels of care which shall result in prompt readjustment of rates.

(3) The Senior Services Division shall establish by rule definitions of levels of care and the payment rates for the patient-based reimbursement system.

**SECTION 3.** This Act being necessary for the immediate preservation of the public peace, health and safety, an emergency is declared to exist, and this Act takes effect July 1, 1987.

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NOTE: Matter in bold face in an amended section is new; matter [*italic and bracketed*] is existing law to be omitted.

COUNSELS' NOTE: A copy of this bill was provided to respondents' counsel by the Oregon Legislative Reference Service who represented that the bill had been signed into law.

No. 86-1419

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On Writ Of Certiorari To The United States
Court of Appeals For The Ninth Circuit

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**AFFIDAVIT OF SERVICE OF RESPONDENTS' SUPPLEMENTAL BRIEF AND REPLY IN SUPPORT OF MOTION TO DISMISS AND NOTICE OF APPEARANCE**

---

Janice L. Hoffman, being duly sworn, deposes and says:

I am a member in good standing of the Bar of the District of Columbia Court of Appeals. On this 25th day of September 1987, I instructed Ms. Beverly A. Patton, my secretary, to serve via

United States mail, first class, postage prepaid, three true and correct copies of Respondents' Supplemental Brief and Reply In Support of Motion to Dismiss and Notice of Appearance on each of the following counsel of record for the parties and amicus:

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Ms. Patton subsequently reported to me that she had deposited the envelopes containing the service copies in a mailbox in front of the United States Post Office located at 1111 - 20th Street, N.W., Washington, D. C. 20036 at 12:55 p.m. on that day.

I further attest that all parties required to be served have been served.

Respectfully submitted,

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Counsel for Respondent
Coos Bay Care Center

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of )
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Subscribed to and sworn before me this 25th day of September, 1987.

Beverly A Patton
Notary Public

My Commission Expires: 4/30/91

bap:371-06cs